



Generally Speaking

Comings and Goings

Congratulations to **Tracy Gould**, who was promoted to a Paralegal in the Oil, Gas and Mining Section.

Sheri Lopez was promoted to a Law Office Assistant II position in the Environmental Section. Congratulations, Sherri.

Ann Vigil joined the Opinions, Ethics and Appeals Section as the Law Office Assistant I.

Karen Burns is the new Litigation Assistant in the Oil, Gas and Mining Section.

Linda Reagan returned as a temporary Litigation Assistant in Collections and Support.

Angela Driggs joined the Torts and Workers' Compensation Section as a Law Office Assistant I.

Mary Hildreth transferred from the Bethel Human Services Section to a Law Office Assistant I position in the Child Protection Section in Anchorage.

Jordan Craddick became a Law Office Assistant I in the Labor and State Affairs Section.

Deb Golden returned to the Department of Law as a temp in the Child Protection Section until October 27th.

LOA I **Dana Cupp** transferred from the Child Protection Section to the Collections and Support Section.

ADA Kelly Lawson resigned from the Fairbanks District Attorney's Office Misdemeanor Unit; her co-workers will miss her humor.

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CIVIL DIVISION

Child Protection

Child Maltreatment Conference. All of the Child Protection Section attorneys and paralegals attended the Child Maltreatment Conference October 16th-18th. This conference was in lieu of the normal January CLE. The conference consisted of several keynote addresses as well as numerous workshops on topics involving legal presentation of child abuse and neglect cases, forensic evaluations, and other substantive areas of relevance to abuse and neglect cases. Attorneys and paralegals very much appreciated the opportunity to attend this high-quality conference.

New CINA cases. New CINA cases of note based upon allegations in OCS petitions:

OCS received reports that a mother was intoxicated. When social workers went to the home they heard her one-year-old child screaming, but were unable to rouse the mother. The child continued screaming for 20 minutes while OCS waited for police assistance to enter the home. When they entered the home, they found the mother was intoxicated and unable to care for the child. OCS placed the child with his father, but then the father was arrested for domestic violence against the mother. Because the mother had not yet begun to participate in treatment, OCS decided to take custody of the child.

Numerous children were taken into custody as a result of parents engaging in domestic violence and chronic use of illegal substances.

A mother dropped her child off with a friend, promising she would return in four hours. When two days later she had not returned, the friend contacted OCS to care for the child. The friend reported that the mother had been smoking crack cocaine. Officers located the mother and her boyfriend at a hotel, and the mother refused to pick her child up.

A severely developmentally disabled child who is unable to take care of himself was taken into custody as a result of his mother's neglect. She failed to get him to school or to an evaluation that was critical to his continued care. She was also refusing to suction his lungs. A shared-care plan was put into place, but the mother refused to comply with her portion of the plan and demanded the child be returned to her. She refused to relinquish his medication until he was returned to her care. Based upon the recommendation of the child's physician, the child was placed in foster care.

A case was reopened on an autistic child whose parents are refusing to get him appropriate medical care or education. School district personnel have serious concerns about the child. Although the parents had entered into an agreement with OCS about the care of the child,

they have refused to comply with the agreement, thus necessitating the filing of another petition.

Troopers responded to a home and found the parents had been drinking all night. The father had assaulted the mother while the two-month-old and three-year-old children were in the home. The parents were still intoxicated when the Troopers arrived. A plan for voluntary placement of the children was established. The children were placed with their grandmother.

A few days later the mother asked to join the children at the grandmother's home, and OCS approved that plan. A month later the mother convinced OCS to allow her to return to her village with the children. She had remained sober and received a substance abuse assessment and indicated a willingness to continue to follow through with treatment. Two weeks later OCS learned the mother and father had been drinking in the home all night and the children had been without a sober caretaker.

Once the mother sobered up, she convinced the social worker to allow the children to remain with her until she entered treatment. She agreed to only let the father visit if he was sober. Later that same day, a Trooper called the social worker to report both parents were intoxicated. The father had kneed the mother in the head several times while the three-year-old was present. The mother refused to cooperate with the assault investigation. The social worker removed the children.

When taking the children to foster care, the three-year-old told the social worker her father had "ouched" her, indicating he hit her in the cheek with his closed fist. She had scratches and a bruise on the cheek. The following day the father was arrested for DUI.

Other activities. AAG Jan Rutherford continues to participate in a workgroup formed by the Rural Justice Commission. The mission of this workgroup is to recommend language for a model MOU between federal, state and tribal entities

concerning the disposition of ICWA cases in the State of Alaska. AAG Rutherford has been participating in weekly teleconferences in order to have a draft MOU available by December.

Collections and Support

The Collections Unit received approximately \$1.8 million from garnishment of the first two PFD distributions in October. The unit expects to receive additional garnishments from the payout of the next phase of PFD distributions. The garnishments cover restitution judgments owed to victims of crimes as well as costs and fines owed to the State of Alaska.

Commercial and Fair Business

Consumer Protection/Anti-Trust

State Sues Several Drug Manufacturers for Unlawful Price Reporting. The state filed a lawsuit against 41 drug companies to recover for inflated prices Alaska paid for prescription drugs. The lawsuit alleges the defendants took advantage of the complex and non-transparent market for prescription drugs to publish false "average wholesale prices" or AWP which then becomes the basis for calculating the price at which providers are reimbursed by Alaska. Alaska is among 23 states to bring a lawsuit alleging AWP manipulation. This conduct, if proven, is a violation of Alaska's Consumer Protection Act which provides penalties of at least \$1,000, and up to \$25,000, for each separate violation of the Act. The state has retained the outside firms of Miner, Barnhill & Galland, P.C. and Beasley, Allen et al. to represent it in this case.

Consumer Protection Outreach at AFN and Alaska Native Arts Summit. The Attorney General's Office, Consumer Protection Unit, was present at the AFN conference, providing consumer protection information to the public from a booth at the convention shared with the Indian Arts and Crafts Board and the FTC. AAG Julia Coster and

Investigator Lisa Turrini (Consumer Protection Section) helped staff the booth. AAG Coster also participated as a group leader in several roundtables at the Alaska Native Arts Summit, presenting information on counterfeit native art.

The Alaska Native Artists Summit was an all day program sponsored by the Alaska State Council on the Arts and the Alaska Native Heritage Center. The purpose of the summit was to provide a forum for native artists to come and get questions answered about fair trade practices, counterfeit art, intellectual property and copyright laws, and obtaining grants. This office's participation in the conference and summit went very well. In addition to providing information that appeared to be very well received, we were able to learn a lot from the artist and vendor participants and obtained a number of leads on potential counterfeit native art that the Consumer Protection Unit will follow-up on.

Division of Corporations, Business and Professional Licensing

Decisions

In the Matter of Moser. On October 2, 2006, Anchorage Superior Court Judge Michael Wolverton issued a decision affirming the Real Estate Commission's June 14, 2005 decision which, following a hearing, suspended for 60 days the license of Anchorage real estate broker Erwin Moser because he falsely denied on his 2002 renewal that he had a lawsuit filed against him alleging dishonesty, fraud and conversion of funds.

In succinctly rejecting Moser's defense that he could not be disciplined for what he claimed was an innocent mistake (due to the fact that his girlfriend filled out the renewal and he merely signed it), Judge Wolverton concluded that "Moser was aware of his involvement in the lawsuit but still indicated otherwise in his application." Wolverton also denied Moser's motion for de novo trial because the hearing officer performed "a complete, sufficient investigation" at the administrative level.

Although Moser quickly filed a notice of appeal to the Alaska Supreme Court, it was withdrawn with prejudice a few days later. In addition to serving a 60 day suspension (which had been stayed pending appeal), Moser is also required to pay a \$2,000 fine, attend a two hour ethics class, and remain on probation for a year following his suspension. AAG Robert Auth represented the Commission in the superior court appeal.

In the Matter of Sorenson. On October 13, 2006, the State Medical Board, in accordance with AS 44.64.060(e)(3), revised the sanction recommended by Administrative Law Judge (ALJ) Andrew Hemenway and revoked the license of Anchorage paramedic Kurt Sorensen based on his felony conviction of misconduct involving a controlled substance in the fourth degree. The ALJ's August 14, 2006 proposed decision, which followed a hearing, had recommended a fine of \$5000 and a letter of reprimand.

As he later admitted as part of a plea bargain, Sorensen, a former battalion chief with the Anchorage Fire Department, knowingly omitted material information from a drug inventory log on three occasions in 2004. Sorensen received a suspended imposition of sentence wherein he was placed on probation for 30 months but if he completed any 24 month period without a violation, he could petition for early termination of probation and discharge of his sentence. The Board's order provides that Sorensen may apply for reinstatement of his license when and if he gets his conviction set aside. AAG Robert Auth represented the Division of Corporations, Business and Professional Licensing at the hearing and throughout this proceeding.

In the Matter of Brown. An administrative law judge recently issued a proposed decision after a hearing in a case arising from a decision by the Board of Nursing to deny Tina Brown's application for certification as a nurse aide (CNA). The Board denied the application because Ms. Brown had been convicted of felony burglary and misdemeanor theft offenses in another state. Under AS 08.68.334 and 12 AAC 44.705 these

are crimes "substantially related to the qualifications, functions, or duties of a certified nurse aide" and grounds for denial of a certification application. Ms. Brown testified at the hearing, but offered no other witnesses on her behalf. The ALJ noted that the convictions had occurred some 12 years ago, but concluded that Ms. Brown had failed to prove her present fitness for certification, and recommended that the Board issue a final decision denying the application. AAG Gayle Horetski represented the Division of Corporations, Business, and Professional Licensing in the case.

Environmental

Alyeska v. State. The Supreme Court affirmed the decision of the Department of Environmental Conservation to charge Alyeska Pipeline Service Company hourly permit administration fees to recoup agency costs incurred for Alyeska's administrative appeal of Air Quality Control Permits for the Valdez Marine Terminal. The Court agreed that the federal Clean Air Act requires the state to recoup all air permit program costs through fees paid by the owners and operators of permitted facilities. Since the costs of an administrative appeal of a particular permit are attributable to a specific facility, the agency's decision to recover the costs through hourly permit administration fees charged to that facility was reasonable. Chief AAG Steve Mulder defended the appeal.

Kensington Appeal. The state filed its brief in the Ninth Circuit, joining the U.S. Army Corps of Engineers and Coeur Alaska Inc. in their defense of the federal permits for the Kensington Mine project. The appeal is now fully briefed, and oral argument is set for Nov. 13th. The central legal issue is how to permit the disposal of mine tailings under the Clean Water Act. AAG Cam Leonard wrote the state's brief.

Human Services

Litigation Update

Section Chief Stacie Kraly briefed the Motion for Temporary Restraining Order and for Preliminary Injunction in the Baker matter (PCA services) this month. Oral Argument was held on October 25, 2006 in Anchorage. The hearing was interesting with the court room jam-packed with PCA recipients and their providers. The argument took about one hour, with Judge Mihalski taking the matter under advisement. The argument went well. Two new attorneys in the section, AAGs Libby Bakalar and Nevhiz Calik applied their recent clerkship experience in helping to prepare the brief; they were a great help.

The section continues to get lots of Certificate of Need litigation. There are two appeals dealing with the definition of "Independent Diagnostic Testing Facility." This was the precise issue raised and litigated in the Banner Health matter in August. That case is heating up again, as an interested party recently filed a motion to intervene.

AAG Nevhiz Calik filed her first 602 appeal brief this past week and did a fantastic job. AAG Hanley Smith from the Child Protection Section helped out while the section was short-staffed, and filed a very well-written brief on a public assistance appeal. AAG Libby Bakalar has taken over the mental commitments and APS matters for Southeast and is working on a very contentious license revocation for the Division of Public Health.

AAG Stacie Kraly continues to be engaged in active settlement discussions in Solski and Krone/Pierce.

Medicaid

Subrogation/Liens

During October 2006, AAG Tim Twomey, Paralegal Kathey Virgin and LOA Shelby King collected \$109,368.10 after resolving 21 matters. "Receivables" total approximately \$135,000 for five additional matters. During the month of October, 31 new Medicaid subrogation/lien matters were opened with a current inventory of 636 open matters. The total amount collected for calendar year 2006 to date is \$1,623,682.60. Total amount collected since taking over subrogation January 2005 is \$2,646,260.53.

Audits

This past month AAG Rebecca Polizzotto has been assigned five new appeals/hearings in superior court related to Medicaid Audits.

Licensing

AAG Polizzotto was a primary presenter and very well received at a 3-day licensing summit for all foster care licensing workers that took place in Anchorage this summer. The decision to centralize licensing and assign one attorney to that post has been much appreciated by the agencies.

APS/API

AAG Beth Russo has taken over full time for Holly Chari and the transition has been very smooth. AAG Russo has had a number of contentious guardianship/conservatorship proceedings but she has handled them all very well. She continues to work on API matters and that process, aside from some procedural issues with the court system, appears to be working very well.

Personnel

AAG Nevhiz Calik and AAG Libby Bakalar continue to progress at a remarkable pace and

have contributed in many ways to the section in their short tenure. It is wonderful to have them on board and working hard on a variety of different matters.

Labor and State Affairs

Alaska Public Offices Commission

Alaska Right to Life Committee v. Miles, et al.

The U.S. Supreme Court on October 2nd denied without comment the petition for certiorari filed by Alaska Right to Life Committee (AKRTL). AKRTL had sued Brooke Miles, the Executive Director of the Alaska Public Offices Commission, and the APOC commissioners, seeking a ruling that Alaska's campaign finance disclosure laws requiring disclosure of electioneering communications made by "non-group entities" such as AKRTL violated the First Amendment. The district court (Judge Beistline) and the Ninth Circuit Court of Appeals rejected the challenge, and the Supreme Court denied certiorari. AAG Mike Mitchell represented the Executive Director and Commissioners.

Elections

Northwest Cruiseship Assoc. v. State. On October 13th the Alaska Supreme Court issued its full decision in this challenge to the Division of Elections' decision to place an initiative proposing additional regulation for cruise ships on the ballot. Earlier (before the primary election) the Court had indicated that it was affirming the Division's decision. The Court rejected a number of challenges to the Division's count of petition signatures. Although the Court found the Division's method of auditing petition signatures to be imprecise, it concluded that the method was reasonable. It concluded that the statute did not require each signature to be dated and that the failure of petitioners to provide the location of certification on the signature booklet was a mere technical deficiency. It further concluded that the Division correctly disallowed signatures on pages

that did not have a "paid by" disclosure and correctly allowed the signatures on pages with that information. Finally, the Court upheld the signatures that were not accompanied by a physical address because sufficient other information was provided to permit verification of the signatures. AAG Sarah Felix represented the state.

Education

Moore v. State. This case challenging the adequacy of public education in Alaska proceeded to trial before Judge Sharon Gleason on October 2nd. AAG Neil Slotnick made the state's opening statement. The plaintiffs rested their case on October 17th and the state's case was in progress at the time this report was written. The state is being represented by AAGs Neil Slotnick, Kathleen Strasbaugh, Anne Johnson, Dean Guaneli, with support from Paralegal Terri Begley-Allen.

Division of General Services (Department of Administration)

Quality Sales Foodservice. On September 25th, the Office of Administrative Hearings issued its decision following a July evidentiary hearing on this bid protest appeal. OAH upheld the award by the Department of Corrections to Country Foods of a contract to supply groceries to Fairbanks-area correctional facilities. The specifications were necessarily complex and both the successful and unsuccessful bids varied from the contract specifications. OAH concluded that the procurement officer handled the bids in a fair and evenhanded manner. In addition, OAH rejected Quality Sales' standing to protest an award to Country Foods for the Anchorage-area lot, because Quality Sales did not bid on that lot. AAG Margie Vandor represented the Division of General Services.

Retirement and Benefits

John Zimmerli v. Administrator, Public Employees Retirement System. On September 25th, Judge

Weeks affirmed the Personnel Board's decision that, as a park ranger employed by the Department of Natural Resources, Mr. Zimmerli was not a peace officer eligible for peace officer retirement benefits. AAG Gina Ragle handled the matter before the Board, and AAG Megan Webb of Opinions, Appeals & Ethics handled the appeal in superior court.

Workers' Compensation

On October 11th, AAG Larry McKinstry argued a workers' compensation appeal before the Alaska Supreme Court, representing the board against allegations that the hearing officer was unfair and biased. The Court took the matter under advisement.

Special thanks to Moore team members AAGs Neil Slotnick, Kathleen Strasbaugh, Anne Johnson, Dean Guaneli, and Paralegal Terri Begley-Allen for their commitment, long hours, and hard work during the trial, and to AAG Gina Ragle for her work implementing the Alaska Supreme Court's order to the state to provide public employees with benefits for same sex domestic partners.

Legislation and Regulations

During October 2006, the Legislation and Regulations Section spent an active month reviewing and processing the first wave of autumn regulations projects.

Regulations projects reviewed in the section included: (1) Department of Environmental Conservation (safe drinking water; certification of operators of water and wastewater systems); (2) Department of Administration (benefits for same-sex partners of retirees and active state employees; defined contribution plan); (3) Department of Health and Social Services (facilities licensure and frontier extended stay clinics); (4) Department of Commerce, Community, and Economic Development (occupational licensing fees); (5) Real Estate

Commission (consumer pamphlets, discipline, continuing education, and property disclosure forms); (6) Board of Professional Counselors (supervisor certification, continuing education, and ethics); (7) Division of Insurance (rate, rule, and form filings); (8) Regulatory Commission of Alaska (rates and charges for pay telephones); (9) Department of Natural Resources (fees for petition to change or vacate an easement, and fees for review of survey plats in an unorganized borough); (10) Department of Revenue (charitable gaming bank accounts; fisheries resource landing tax; permanent fund dividends); (11) Department of Corrections (access to law libraries and cost of imprisonment); (12) Board of Fisheries (SE Alaska commercial shrimp pots; Cook Inlet sport fisheries); (13) Board of Game (taking and use of game in Interior Region); (14) Department of Law (procedures for complaints against administrative law judges and hearing officers).

The section also edited legislation for consideration for the 2007 legislative session, and opened bill drafting files for governor's office legislation for 2007. The section also provided training for law office assistants in the preparation and formatting of legislation.

Natural Resources

Tongass Negotiations. On August 5, 2005, the Ninth Circuit Court of Appeals invalidated the 1997 Tongass Land Management Plan (TLMP) in *NRDC et al. v. United States Forest Service et al.* The case was remanded to the District Court to consider the need for injunctive relief regarding timber sales until such time as the deficiencies in the TLMP are remedied. The District Court ultimately granted the plaintiffs-appellants partial relief by issuing a portion of the injunctions that were requested.

The Tongass is a critical source of timber for several lumber mills that operate in Southeast Alaska. The State of Alaska, represented by the Division of Forestry and the Attorney General's

Office, has joined with the Alaska Forest Association as defendants-intervenors-appellees in this matter. Negotiations are ongoing among all parties in an effort to reach a settlement on short-term issues that will allow Alaska's timber industry to remain in operation during the TLMP revision process.

Lynn Canal Conservation, Inc., et al. v. State of Alaska, DNR. On October 19th, the state filed supplemental briefing in *Lynn Canal Conservation, Inc., et al. v. State of Alaska, DNR*, an administrative appeal from a decision by the Commissioner of Natural Resources, declining to prohibit a commercial jet boat tour operator from operating within the Chilkat Bald Eagle Preserve. On October 9th, the state had filed an opposition to a motion by LCC to amend its points on appeal in order to argue that the Commissioner of Fish and Game was the *de facto* decision maker below, because ADF&G provided comments to DNR on whether jet boat use appears to be causing damage to salmon rearing habitat in the Upper Chilkat River. At the request of Juneau Superior Court Judge Patricia Collins, the parties submitted supplemental briefing on the question of when, if ever, an agency with no statutory authority over permitting within a legislatively designated area may be deemed the *de facto* decision maker by virtue of its consultative role. AAG Tom Lenhart represents DNR with assistance from AAG John Baker.

Winter Board of Fisheries Regulatory Cycle Started. The Board of Fisheries has started its 2006-2007 regulatory cycle which involves a number of regulatory meetings requiring Department of Law attendance and advice on regulatory proposals. Although the 2006/2007 cycle involves fewer proposals than normal, it is still expected to involve over 30 meeting days and over 250 regulatory proposals. On October 11-13, Senior AAG Lance Nelson and AAG Steven Daugherty attended new member orientation and a work session of the Alaska Board of Fisheries in Anchorage and provided advice on a variety of agenda change requests. On October 14th-15th AAG Steven Daugherty attended a

regulatory meeting of the Alaska Board of Fisheries in Anchorage relating to state water groundfish fisheries and possible Endangered Species Act issues. During this meeting, the Board adopted a new Aleutian Islands District Pollock Management Plan providing for a small new state water fishery and also adopted regulatory changes intended slow down the state water Pacific cod fishery in the Aleutian Islands.

Federal Subsistence Issues Heat Up. October was as busy month for federal subsistence issues. On October 6th, AAG Steven Daugherty filed a motion for summary judgment in *State v. Fleagle*, a case in the Federal District Court challenging a customary and traditional use determination by the Federal Subsistence Board for all 10,000 square miles of Game Management Unit 12 based on a record demonstrating actual and historical use in less than 25 percent of the unit.

On October 10th, the United States filed its brief in the consolidated Federal Reserved Water Rights litigation (*Katie John v. U.S.*); the state's reply brief is due on November 6th; the natural resources section is assisting outside counsel, Bill Horn, with this matter. AAG Daugherty also reviewed a number of denials of requests for reconsideration from the Federal Subsistence Board, provided advice to ADF&G relating to the Federal Subsistence Board's attempts to create new federal subsistence fisheries on the Kenai and Kasilof for the 2007 season, and reviewed draft comments regarding the state's objections to the Federal Subsistence Board's rural/nonrural review process which is currently scheduled to be completed in December.

Special Board of Game Meeting on Tier II Issues. From October 7th-9th, the Board of Game met in Anchorage to address a series of proposals designed to alter the troublesome Tier II subsistence hunting permit impasse in Game Management Unit 13, which includes the state's most controversial hunt, the Nelchina Caribou Herd hunt. Several proposals would have radically altered the framework for obtaining permits. This area is commonly hunted by local residents and

by Fairbanks, Anchorage, and Valley residents who all claim subsistence dependence on the moose and caribou herds located there. Hunting methods have become increasingly mechanized, often involving use of expensive motor homes towing trailers loaded with 4-wheelers or larger, custom-built off-road vehicles. Also, it is becoming increasingly difficult for new hunters to have a chance at obtaining these coveted permits. Public complaints about these, and other issues stemming from the legal constraints on herd management, abound. Overall, the Board adopted several proposals that are designed to ensure that the use being protected is actually a subsistence use. Thus, the Board required salvage of all meat, edible organs, and the hide, and required destruction of the trophy value of the antlers. The Board also indicated an intent to severely restrict the use of motorized vehicles, and scheduled further work on this topic for the spring meeting in Anchorage. AAG Kevin Saxby provided legal advice throughout the meeting.

Opinions, Appeals and Ethics

Ethics

The section did not receive any new complaints for the month. Ethics educational materials were reviewed to ensure they were up to date. Six requests for conflict waivers were granted with two requests pending.

Appeals/Litigation

Briefs and Other Pleadings

Alaska Dental Society and American Dental Association v. Alaska Native Tribal Health Consortium. The state filed its answer to the first amended complaint. The complaint primarily alleges that the state has a mandatory, non-discretionary duty to enforce the Dental Practices Act against dental health aides licensed by the federal Community health Aide Program. The dentists claim that the dental health aides must be licensed dentists. The dentists also claim that

they are being denied equal protection of the laws because they must pay licensing fees to the state while dental health aides do not. The state denies the allegations because federal law preempts state law under the particular circumstances of this case.

Tanana v. State. AAG Paul Lyle assisted AAG Dan Branch in drafting the state's reply to Tanana's opposition to the state's motion for summary judgment. The state seeks a summary judgment declaring that Alaska native villages do not have inherent authority or authority under ICWA to initiate child protection cases that concern Alaska native children domiciled outside of Indian country. The state filed its reply on October 6th.

Alaska Trademark Shellfish. AAG Joanne Grace wrote the state's appellee brief in this case arising from the decision of the Alaska Department of Fish and Game that aquaculture farmers could not harvest and commercially sell wild geoduck stocks found within the boundaries of the farm sites. The case is before the Alaska Supreme Court for the second time.

Arguments

State v. Jeffery. AAG Joanne Grace had oral argument before the Alaska Supreme Court in *State v. Jeffery*, a case that arose when two state court judges failed to file declarations of candidacy for retention in the 2004 general election.

Allstate Insurance Company v. Melissa v. Falgoust. AAG Megan Webb had oral argument before the Alaska Supreme Court in this case. Allstate issued a homeowner policy to foster parents. After a foster mother killed a child, two other foster children who witnessed this made claims, and Allstate filed suit. Allstate later asked the court to amend for declaration that the state was obligated to defend and indemnify the foster parents for these claims. The trial court declined the amendment saying that because a

separate tort action has been filed, Allstate should take up that issue at a later time.

Other Matters

Attorney General Márquez adopted regulations establishing procedures for handling complaints against state hearing officers and administrative law judges. The procedures apply to complaints under the code of hearing officer conduct and provide for investigation, hearing, and resolution of the complaints.

Regulatory Affairs & Public Advocacy (RAPA)

Pre-filed Testimony

RAPA filed testimony in three adjudicatory proceedings before the RCA this month.

U-06-46, Enstar service line installation fee.

This case concerns Enstar's *implementation* of an RCA-approved increase, from \$20 to \$600, in the fee for utility installation of a meter and/or service line. The RCA denied a Petition for Reconsideration by the Anchorage Home Builders Association and reaffirmed an April 21, 2006 effective date for the approved fee increase. Enstar offered to apply the \$20 fee to service line installation applications made from January 1 to April 21, 2006, so long as service could be installed during the 2006 construction season.

On October 5th RAPA filed the testimony of its staff economist, Cristina Klein, which recommended an earlier cut-off date of January 1, 2005 for application of the previous \$20 fee, as long as the applicant's structure is ready for line service installation before the end of the 2007 construction season. The earlier cut-off date would capture most, if not all, serious construction endeavors *started* under the old tariff fee but completed *after* April 21, 2006 when the higher fees became effective. Likewise, RAPA's recommendation would allow nearly two years for builders to ready structures for line service

installations under the old fee schedule. A hearing is scheduled for November 29, 2006.

U-06-06, ML&P depreciation study. This docket was opened by the RCA to adjudicate a depreciation study filed by Municipal Light and Power (ML&P), which was required by the Commission after ML&P's last rate case. ML&P provides electric utility service within the Municipality of Anchorage in a service area separate from that covered by Chugach Electric Cooperative.

RAPA's contract analyst, William Dunkel, analyzed the utility filing to determine the appropriate regulatory depreciation rates. The Dunkel pre-filed testimony of October 10, 2006 proposed different (reduced) depreciation rates than those proposed by ML&P for general plant, production plant, and distribution plant. A hearing is scheduled for December 12, 2006.

U-06-45, AWWU (water) rate case. The Anchorage water utility filed for an 8.9 percent rate increase based upon a 2004 test year revenue requirement study. The RCA granted the increase on an interim and refundable basis. On October 23rd, RAPA filed the testimony of staff financial analyst, Janet Fairchild, and the testimony of contract analyst, Dr. J. Randall Woolridge.

Dr. Woolridge evaluated the utility's proposed overall rate of return of 7.9 percent but concluded that 6.15 percent would be a more appropriate cost of capital for the water utility. The Fairchild analysis (incorporating the Woolridge recommendation) proposed numerous adjustments to the utility's proposed revenue requirement and rate base.

Ms. Fairchild's testimony rejected the utility's proposed 8.9 percent overall rate increase for a 1.69 percent increase, which would yield a 7.21 percent refund to ratepayers. Her analysis of the utility's cost of service study found an 8.7 percent *over-recovery* in rates from multi-family residential customers. Thus, her testimony

recommended a rate redesign to establish a separate customer class for single-family, residential customers to correct the current cross-subsidy. A hearing is scheduled for January 16, 2007.

Torts and Workers' Compensation

Workers' Compensation Board Finds for State. A former correctional officer at the Cook Inlet Pretrial Facility filed a workers' compensation claim seeking permanent total disability benefits for Post Traumatic Stress Disorder. The Board denied all of the employee's claims finding that his alleged injury was not compensable because he had failed to prove that the mental stress he experienced met the definition of "injury" found in the Alaska Workers' Compensation Act. The employee also asserted that the state should not be allowed to challenge the compensability of his claim because it had initially paid benefits to him in connection with his claim. The Board denied the employee's request finding that he had failed to show that he had suffered any prejudice as a result of the state's initial payment of his claim. Defense in this workers compensation matter was handled by AAG Rebecca Cain.

Supreme Court Remands Case to Trial Court. A female inmate sued the state alleging that she had been sexually assaulted by a former physician assistant employed at the Anchorage Jail (who was later convicted of attempted sexual assault in the third degree for one of two claims of assault). The state moved for summary judgment arguing that it is immune for claims arising out of assaults or batteries based on AS 09.50.250(3). The Supreme Court affirmed the trial court's ruling that the state could not be sued for claims arising out of the department's employment relationship with the PA such as negligent training, supervision, or hiring of the PA. However, the Court remanded the matter to the trial court noting that the plaintiff should be allowed the opportunity to amend her complaint to allege a claim based on an independent duty to

the plaintiff. The case was handled on appeal by AAG Venable Vermont, Jr.

Relief Denied in Pro Se Lawsuit Against the Alaska Commission on Judicial Conduct. In *DeNardo v. Morse et al.*, 3AN-05-11307, Superior Court Judge Tan granted a motion to dismiss all claims against the Alaska Commission on Judicial Conduct and its executive director, both represented by AAG Ruth Botstein. DeNardo sought declaratory and injunctive relief against the ACJC after it dismissed for lack of probable cause DeNardo's allegations of misconduct against several judges. Judge Tan found that the superior court did not have jurisdiction to review the ACJC's actions, because the Supreme Court has exclusive jurisdiction over judicial discipline matters. The court also determined that there exists no private right of action under Alaska law for a challenge like DeNardo's, and that Greenstein and the ACJC have immunity from suit under 42 U.S.C. 1983 because their actions were judicial in nature.

Appellee's Brief In Challenge to AS 9.50.250(5) Filed (sovereign immunity reimposed for state employed seamen). This month the section filed its Appellee's Brief in the Alaska Supreme Court defending the constitutionality of AS 09.50.250(5). That statute was enacted in 2003 to assert the state's sovereign immunity and withdraw consent to personal injury lawsuits brought by state-employed seamen under the Jones Act and maritime law. Instead of permitting state employee seamen to file civil lawsuits for their work-related injuries, the law provides workers' compensation as the exclusive remedy for injured state-employed seamen (as for all other state employees).

An AMHS ferry worker had challenged the statute, raising a variety of state and federal constitutional arguments. The superior court found for the state on all counts, and granted summary judgment in January 2005. The ferry worker appealed that judgment. The state appealed the court's decision to award the state attorney fees of only \$1,000. The state's brief on the

constitutional claims, as well as the attorney fee issue, was filed October 17, 2006. The appellant's reply brief will be due next month. Oral argument has not been scheduled yet.

Transportation

State Intervenes in Litigation Challenging Juneau Access Project. The state moved to intervene in a U.S. District Court lawsuit brought by the Southeast Alaska Conservation Council (SEACC) against the Federal Highway Administration (FHWA) challenging the FHWA's approval of the Juneau Access Improvement Project. The FHWA had approved construction of a 50-mile road from the end of Glacier Highway at Echo Cove to the Katzeihin River delta, with construction of a new ferry terminal at the end of the new highway to support shuttle ferry service to Haines and Skagway. AAG Peter Putzier represents the state.

Governor Issues Disaster Declaration. Following flooding throughout Southcentral Alaska, the Governor issued a declaration of disaster and suspension of certain state regulatory laws to allow swift governmental response to the floods. AAGs Leone Hatch and Jim Cantor provided a transportation perspective to assist the multi-department effort to issue the Governor's declaration.

DOT&PF Obtains Summary Judgment. A newly re-paved highway in Unalaska deteriorated almost immediately after construction, leading to litigation in both state court and an administrative forum. The superior court action concerned a portion of the highway owned and constructed by the City of Unalaska. The construction contractor alleged the deterioration on the City road resulted from a bad asphalt mix design supplied by the state. The superior court granted the state summary judgment, which relieved AAG Jeff Stark and paralegal Sherene Jensen from a three-week trial in Unalaska, although the court is currently reconsidering its decision. An administrative trial is scheduled for December, 2006, during which

the state will seek damages from the construction contractor. AAG Susan Urig is also assisting with this case.

Juneau Highway Project Progresses. AAG Peter Putzier obtained an order confirming possession and title to land taken by DOT&PF from the former Kmart property in Juneau for a highway project.

CRIMINAL DIVISION

Anchorage DAO

Darian Patterson convicted of attempted murder and assault one in senseless shooting. On the evening of April 2, 2006, a group of four soldiers and their sergeant from Ft. Richardson went out with five young women. The group of 10 went to a strip club in Muldoon, all riding together in the sergeant's Nissan Armada, a large SUV. About 3:30 a.m., they started home, stopping at the Holiday Gas Station at Muldoon and Duben for the sergeant to get snack food for some of his men who were on duty. Inside the gas station, the women got into a fight with some others, but the fight was broken up, the 10 got back into the Armada and started to drive away from the store. As they started to drive away, Darian Patterson walked in front of the Armada to stop it. Patterson continued to walk around the Armada to the passenger side, where the sergeant was seated in the right front passenger seat. As he approached the passenger door, Patterson pulled out a .40 caliber handgun and pointed it at the sergeant. Realizing what was about to happen, the driver of the Armada accelerated. She accelerated just as Patterson fired toward the sergeant. The bullet entered the window behind the sergeant and went into the headrest of his seat, spraying glass all over him.

As the driver continued to accelerate out of the parking lot, Patterson fired seven more times. The seven shots went into the tailgate of the Armada and penetrated the rear seat where people were sitting. Two of the women seated in the back seat were struck by bullets. One was shot in the back and through her lung.

Another of the women was struck in the lower back, with the bullet exiting her thigh. Patterson was charged with attempted murder for shooting at the sergeant, two counts of assault in the first degree for shooting the two women in the back seat, eight counts of assault in the third degree for placing the people in the Armada in fear of being seriously physically injured, and criminal mischief in the third degree for damaging the vehicle. In a nine day trial before Judge John Suddock, the jury convicted Darian Patterson of all charges. ADAs John Skidmore and Rob Henderson tried the case for the state.

Carlton Pitts convicted of driving the wrong way on the Glenn Highway. On May 13, 2006, Carlton M. Pitts was driving on the Glenn Highway, traveling in-bound to Anchorage, but in the out-bound lanes. Other drivers took evasive action to avoid him and some of them called 911 to report what was happening. More drivers called 911 to report when Pitts arrived several miles further into downtown Anchorage, traveling southbound on I Street. I Street is a one-way street northbound, so he was still traveling in the wrong lane, against the flow of traffic. Police caught up with him at the intersection of I Street and 13th Avenue.

Police stopped Pitts and surrounded his vehicle. They told him to get out of his car, but he refused. Police then broke the driver's window, but Pitts got even more agitated. He opened his door and stepped out, but refused to follow police commands and began running north on I Street. A police dog was released and, in the course of the chase, Pitts leapt over the dog and continued running. Eventually, the dog caught him.

A jury convicted Pitts of reckless driving and of resisting arrest, but hung on assault in the third degree for placing another driver in fear of being seriously physically injured by him. ADAs Brittany Dunlop and Sharon Marshall tried the case for the state before Judge John Suddock.

Buford Goldsmith convicted of assault in the second degree for injuring his ten-month-old son. On October 20, 2006, a jury convicted Buford Goldsmith of assault in the first degree and

assault in the third degree for injuries he inflicted on his ten-month old son in June 2004. In June 2004, the child's mother took her son to Providence Hospital. The child was lethargic and did not want to move his body; he would emit a high-pitched squeal every time he was touched. His mother reported that he had regressed in his development. The doctors found a subdural hematoma, retinal hemorrhaging, skull fracture and evidence of prior subdural hematomas.

Anchorage Police Department investigators found the child had also been taken to Providence in February, 2004, when the mother reported the child was experiencing flu-like symptoms, including vomiting. The mother reported the child had fallen off a couch and hit his head on a coffee table. (The vomiting may have been a symptom of a head injury as well as a symptom of the flu.) The defendant Buford Goldsmith admitted being with the child when some of the injuries were sustained, but denied they resulted from his mistreatment of the child. ADA Adrienne Bachman tried the case for the state.

Joshua Thomas convicted of assault in the second degree for physical abuse of child. On November 25, 2005, a doctor at the Alaska Native Medical Center called the Anchorage Police Department to report the physical abuse of a child brought to the hospital. The mother had brought her one-year-old child to the hospital for routine immunizations, reporting that, about a week ago, she had noticed the child was not using his arm. She had decided to wait until the appointment for immunization to bring up the subject of the arm with the doctor. She explained she had been with the child for the last two weeks with the exception of one day when the defendant, Joshua Thomas, the child's father, had cared for him.

Joshua Thomas told police he might have been too rough with the child in the past, but did not think he had caused any bone to be broken. But he admitted that, about a week earlier, he had picked up the child by one arm, lifted the child to the level he wanted, and then released the child's arm, grabbing the child around the body.

The police detective went back to the mother, who then added to her statement. This time, she said she knew when the injury occurred. She heard the child crying from a bedroom where she found not only the child crying, but Joshua Thomas crying too, saying he had picked up the child by one arm. The mother told police the child's arm was swollen.

On that evidence, a jury sitting before Judge John Suddock convicted Thomas of assault in the second degree for recklessly causing serious physical injury to the child. ADA Sharon Illsley tried the case for the state.

Isaiah Chikigak pleads to murder in the second degree and gets 75 years in jail. On October 10, 2006, Isaiah Chikigak entered a plea of no contest to murder in the second degree under a plea agreement in which he agreed to be sentenced to 75 years in jail. Judge Leonard Devaney sentenced Chikigak to 75 years in accordance with that agreement.

Isaiah Chikigak, age 20, of Alakanuk, was an acquaintance of Mary James, age 19. They went to a party and drank home brew. When the party was over, the two went to an area near the airport and continued drinking. About five days later, a person found the body of Mary James buried in the area, her foot sticking out of a mound of dirt. At an autopsy, the medical examiner found the woman had been brutally beaten and tortured with branches and sticks.

Chikigak told a trooper the two had sex and then he blacked out. He said he came out of the blackout to find himself beating Mary James, kicking her with steel-toed boots. He stopped when he saw blood coming out of her ears. He stated he then buried her, while she was still breathing and making noise. Anchorage ADA John handled the case, which had fallen to him during one of his visits to the Bethel DA's office to help out.

Fairbanks DAO

Fairbanks experienced a rather warm and dry October which seemed to dry up felony drinking and driving in Fairbanks. Only three felony DUI's were referred for prosecution and two were presented to the grand jury through the first three weeks of October. Felony property crimes became popular with 26 referrals in the same time frame. Ten new drug cases were referred to the office in the same time frame. The grand jury returned 19 indictments through the first three weeks of the month.

In the poor judgment category, one of the drug cases referred in October involved a defendant who was out on bail in two separate felony cases in which he was facing a total of 13 counts of fraudulent use of a credit card, theft in the second degree and forgery in the first degree.

He had been trying to work out a deal in which he would work for ABADE, since he is facing presumptive sentencing on the property crimes. Based on the crimes with which he was charged, ABADE did not want to work with the individual. ABADE was more than happy to assist AST Patrol when the individual was observed driving a vehicle with a load of schedule IIA controlled substances and a registration that had been expired for over two years.

The misdemeanor unit had 290 referrals for the first three weeks of October. Driving under the influence referrals totaled 57. In addition to the cases that needed screening, the misdemeanor unit has averaged at least a trial a week.

Juneau DAO

The Juneau DAO has been covering Sitka and Angoon to allow ADA Gregg Olson and AAG Dwayne McConnell to proceed with a homicide trial in Petersburg.

During the past month, the Juneau office tried two felonies. The first was a sexual abuse of a minor in the first degree and a sexual abuse of a minor in the second degree, where the jury

convicted a defendant on both counts for offenses that occurred in 2005. The office also tried a difficult jail house assault that occurred in the Lemon Creek Correctional Center. The jury convicted the defendant of assault in the second degree for pulling his roommate from the top bunk to the concrete floor, shattering the victim's pelvis and severely disabling the victim. Things have reportedly been quieter in LCCC since the defendant's conviction.

In the upcoming months, the office is preparing for a homicide trial in Juneau, and a manslaughter case involving two co-defendants. In the manslaughter case, the two co-defendants were fighting in a vehicle which struck another oncoming car and caused the death of a college student returning from classes at UAS on the first day of the semester.

Kenai DAO

Things continue to be busy in Kenai. By the start of October, statistically, the office had opened more cases than in the year 2005, so the office is three months ahead of last year's crime wave. The grand jury has seen some interesting cases, beyond the usual range of felony DUIs, drugs, and assaults.

In a three-co-defendant case, the grand jury returned indictments charging the three with attempted arson in the first degree and burglary in the second degree. The "mastermind" was charged with solicitation to commit arson in the first degree. The organizer of the crimes owned a restaurant in a shopping center on the main commercial street in Homer. Other businesses and agencies in the center were the Bargain Basement Thrift Store, Subway Restaurant, Homer Hardware, the National Association for the Mentally Ill (NAMI), and the State Department of Motor Vehicles.

When police arrived at the scene, they found a variety of flammable products arranged to ignite. Near the flammable materials officers found an

electronic circuit board with wire leads and a 9-volt battery attached, as well as cylindrical rocket "motors" that can be ignited by an electric current, and in turn can ignite model rocket motors. Only one of the three motors found appeared to have ignited. Officers developed suspects, one of whom confessed to the arson attempt, admitted that he did not act alone, but refused to name his co-conspirators. Finally, a former employee of the restaurant came forward with information that the restaurant owner had tried to hire him to commit the arson to collect insurance.

Three interesting white-collar cases were presented to the grand jury. In the first two related cases, a boyfriend and girlfriend opened accounts at Alaska USA Federal Credit Union. The grand jury was told that a person can actually open a checking account at the bank with no money. However, the person has to deposit \$5 before receiving any checks. The girlfriend activated her account first by depositing \$5. She then wrote 141 checks in a five-week period. The day her spree was ended by the police, the boyfriend activated his account with \$5 and wrote 41 checks in a one-week period before he was stopped.

In the third case, a waitress was working at her family's restaurant. When people would pay with a credit card, she would write down the card number and return the card to the customer. None of the customers knew there was a problem with their credit cards until unauthorized uses appeared on their statements, or they were called by the card company when suspicious activity was noticed. The defendant made all of her purchases over the internet, starting either the day the card was used at the restaurant, or the day after. She "shopped" at Victoria's Secret, Nordstrom's, and Allen & Petersen's among others. When the officers confronted her, she lied about having any involvement and then, rather than return the items, she threw them in the lake where officers would later recover them. Her excuse was she was buying things for her family.

Kodiak DAO

A 34-year-old Kodiak cannery worker was sentenced to 36 months in prison, with 30 months suspended, following his conviction for third degree assault following his attack on a bunk-house roommate. He was also placed on probation for five years on the conditions that he not drink nor possess any alcohol during that period of time.

A 26-year-old Cordova man in Kodiak on a commercial fishing boat was convicted as an accomplice of class B felony interference with official proceedings after helping another defendant who was beating up a witness scheduled to testify against him. The "other defendant" was convicted of felony assault and sentenced to 120 days in jail. This defendant was given a suspended imposition of sentence, with probation for five years, and sentenced to serve 90 days in jail.

Nome/Kotzebue DAO

Joachim Carlisle was charged with arson in Nome. Early one morning last March, Carlisle sat simmering outside a small house knowing that inside his ex-girlfriend had met a new man. Incensed, Carlisle splashed kerosene on the side of the house and set it afire. Carlisle then watched from a distance as flames crept up the outside wall. He also recognized the passerby who saw the fire and rushed inside to clear the house. The passerby was Superior Court Judge Ben Esch, in front of whom Carlisle had appeared many times. Carlisle was immediately suspected in the burning, but could not be linked to the fire until later this summer when he confessed to a Nome police officer. After getting it all off his chest, Carlisle told the officer that he fully expects to serve 15 years for this crime.

In Kotzebue, ADA Paul Roetman, Victim Witness Paralegal Paul Nolton, and Law Office Assistant Elaine Snyder moved into a new office. They leave behind a long held ground level space,

(where spring breakup was not strictly outdoors) for a newly renovated space on the second floor of the NAPA building. Local law enforcement stopped by for an open house.

Palmer DAO

On October 10, 2006, Christopher Kevan was convicted of two counts of murder in the first degree and four counts of murder in the second degree after a jury trial. Kevan killed his girlfriend, Brandie Burns, and their 6-week-old baby, Ashton, on October 26, 2005. The trial was prolonged by defendant's disruptive behavior. ADA Richard Payne was the trial prosecutor.

Matthew Kompkoff was indicted on charges of murder in the first degree, murder in the second degree, manslaughter, criminally negligent homicide and assault in the first degree for killing his wife, Kelly Kompkoff, by stabbing her. The stabbing occurred in Tatitlek, and Kelly Kompkoff died in Valdez while awaiting air transport to an Anchorage hospital. ADA Jon-Marc Petersen handled this case for the state.

A Palmer jury convicted Joseph S. O'Brien as-charged of criminally negligent homicide and driving on a suspended license. O'Brien was driving on the Parks Highway near the Big Lake turn-off and struck Calvin Toal, who was riding his snow machine on the shoulder of the highway. O'Brien was driving a sub-standard truck, with an iced windshield, defective defroster and heater, and poor brakes. The trial prosecutor was ADA Suzanne Powell.

Billy Jones was sentenced to a composite term of 12 years, with seven years suspended, on three felony charges and one misdemeanor for his role in forgeries, thefts and a burglary. ADA Suzanne Powell also prosecuted this case.

Michael Phillips was indicted on charges of sexual assault in the first degree, assault in the first degree and assault in the second degree for a violent rape of a woman he met while working in Cordova. He raped her in an alley and caused

injuries that required surgery. Prosecutors were ADAs Rachel Gernat and Michael Perry.

David Lease was indicted on charges of sexual assault and incest for abusing a family member living in his home. The state had to get a material witness warrant and arrest the first reporter, who told the investigating officer he would not appear for grand jury despite being issued a subpoena. Prosecutor for the state was ADA Rachel Gernat.

Mary Bright was convicted, after a jury trial, of contributing to the delinquency of a minor and disorderly conduct for encouraging her niece to fight another student at Wasilla Middle School. ADA Jon-Marc Petersen was the prosecutor.

On October 26, 2006, Judge Eric Smith sentenced Jimmy Dale to a composite sentence of 23 years and four months to serve (with no time suspended). In July, a jury found Dale guilty of two counts of assault in the first degree, two counts of assault in the third degree, leaving the scene of an accident, DUI and driving on a suspended license. In October of 2005, Dale got drunk and drove his truck off a 150-foot embankment. The vehicle landed on its roof, and Dale departed the scene, leaving two injured female passengers behind. Dale had a lengthy criminal history and was on felony probation. Luckily, the passengers' injuries were not life-threatening or permanent. ADA Suzanne Powell prosecuted the case.

SAVE THE DATE

Juneau Dept. of Law Holiday Party -
December 12th; Buoy Deck 5:00 pm

Anchorage Dept. of Law
Holiday de Lites Party - December 13th;
2:30 pm - 4:30 pm